FILED
941954 MAY 26 1995
OFFICE OF THE CLERK

No. _____

In The Supreme Court Of The United States

October Term 1995

Jewell Kissinger and Gladys Kissinger — Petitioners

v.

Arkansas State Highway Commission — Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF EIGHTH CIRCUIT COURT OF APPEALS

KEITH BLACKMAN
512 W. Jefferson, P. O. Box 1233
Jonesboro, Arkansas 72403
(501) 932-2101

Attorney for Petitioner

PARAGON PRINTING & STA., 311 East Capitol Avenue, Little Rock, AR 72202 (501) 375-1281

22pp

QUESTION FOR REVIEW

Whether petitioners should be denied the right to due process against the Arkansas State Highway Commission when their land has been taken without compensation.

TABLE OF CONTENTS

Page

Opinions Below i

Statement of Jurisdictional Grounds i

Table of Contents ii

Table of Authorities iii

Statement of Facts 3

Brief and Argument 4

Appendix

Order of Craighead County Circuit Court A-1

Opinion of Arkansas State Claims Commission B-1

Order Dismissing 8-23-94 (U.S. District Court) C-1

Order of 8th Circuit U. S. Court of Appeals D-1

TABLE OF AUTHORITIES

Page

Arkansas State Highway Commission v. Alcot, 539 SW2d 432 (1976) 7

Bailey V. Anderson, 326 U.S. 203, p. 205 5,6

City of Greenwood, Mississippi v. Peacock, 384 U.S. 808 (1966) 4,5

Florida Power Corp. v. F.C.C., 722 F. 2d 1537 5

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 8

Harris v. Missouri Conservation Commission, 790 F2d 678 and 472 F. App. 33 (E.D. Ark. 1974) 4,5

Hospital Building Company v. Trustees of Rex Hospital, 96 S. Ct. 1848, 425 U.S. 738, 48 L.Ed. 2d 338 5

Jaggers v. Zolliecoffer, 290 Ark. 250, 718 SW2d 441 (1986) 8,9

Restatement of Torts II, 825(b) comment (d) 8

Robinson v. Arkansas State Game and Fish Commission, 565 SW2d 433 (1978) 6

Robinson v. Beaumont, 91 Ark. 477, 725 SW2d 839 (1987) 8

Robinson v. City of Ashdown, P. 231-232 7

State v. McElroy, 595 SW2d 659 (1980) 6,7

No._____

In The Supreme Court Of The United States

Jewell Kissinger and Gladys Kissinger *Petitioners*

v.

Arkansas State Highway Commission *Respondent*

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF ARKANSAS COURT OF APPEALS

OPINIONS BELOW

The Order of the Craighead County Circuit Court is attached as Appendix A-1. The opinion of the Arkansas State Claims Commission dated August 10, 1993 appears as Appendix B-1 hereto. The U. S. District Court for the Eastern District of Arkansas granted a Motion to Dismiss on August 23, 1994, with a copy of the order appearing as Appendix C-1. The Order of the Eighth Circuit U. S. Court of Appeals filed February 28, 1995 appears herein as Appendix D-1.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the U. S. District Court for the Eastern District of Arkansas for which review is sought was delivered on August 23, 1994. Appeal was duly taken to the Eighth Circuit Court of Appeals per Notice of Appeal of September 7, 1994. The Eighth Circuit Court of Appeals affirmed the District Court by Order filed February 28, 1995. The Petition is filed within 90 days of such order affirming the decision of the District Court.

Rule 10 of the rules of the Supreme Court confer jurisdiction upon the Court to review the decision of the 42-Eighth Circuit Court of Appeals, in that it decided an important federal question contrary to the decisions of this Court and the U. S. Constitution and rendering constitutional provisions meaningless in the State of Arkansas in instances such as this one.

QUESTION FOR REVIEW

Whether petitioners should be denied the right to due process against the Arkansas State Highway Commission when their land has been taken without compensation.

STATEMENT OF FACTS

In the latter part of 1987 and the early part of 1988, the defendant, Arkansas State Highway Commission, came upon a portion of the property owned by the plaintiffs and bulldozed trees and shrubs and tore out the driveways and entry into the plaintiffs' home and adjacent rental house. Road access was denied to the property by the highway commission. In the same action, plaintiffs' fences were damaged or destroyed, along with a portion of their yards. No prior notice was given and no eminent domain action was ever initiated by the defendant, nor was any need established for the taking for public use or purpose of the property. The condemnation of the land was obviously not according to law. The plaintiffs filed suit in their local Circuit Court seeking damages for constitutional due process violations, as well as damages to property not taken and for the taking of a portion of the property. Subsequently, the Craighead County Circuit Court refused to hear the case, citing governmental immunity, and plaintiffs thereupon filed a claim with the Arkansas State Claims Commission on October 18, 1991. The Claims Commission ultimately rendered a decision in the claim only on the issue of damage to the plaintiffs' property in the sum of $13,000.00. The Arkansas Claims Commission refused to address the issue of the taking of the property and the issues of damages for the constitutional violations and due process damage allegations. The plaintiffs were prepared to present evidence at the hearing that a portion of their property had been taken and their constitutional rights violated, but the Arkansas Claims Commission refused to hear those issues. Thereby, the plaintiffs were denied any hearing with regard to the taking of their property or their issues of denial of their constitutional rights. They then filed an action in the Federal District Court for the Eastern District of Arkansas, to seek redress for the actions. The defense filed its Motion to Dismiss, and after review of the motion and the response and briefs of the parties, the Federal District Court entered its order granting the Motion to Dismiss. The 8th Circuit Court of Appeals endorsed the District Court Judge's ruling in a summary decision, and this appeal follows.

BRIEF AND ARGUMENT

The plaintiff's appeal in this matter is based upon the erroneous ruing of the Court dismissing plaintiffs' complaint. The defendant filed its F.R.C.P. Rule 12(b)6 motion along with the assertion that the suit was barred by the 11th Amendment to the U. S. Constitution and other bases. The Federal District Court granted the motion based upon its determination that the suit was barred by the 11th Amendment to the U. S. Constitution.

In this circumstance, the appellants tried to follow through with the actions provided by the Circuit Court and the Arkansas State Claims Commission, but were denied due process and the opportunity to air their complaint. The Claims Commission refused to consider the issues of due process and the issue of the actual taking of property by the defendant. The State of Arkansas originally set up the Claims Commission so that such claims could be heard and dealt with, but due process was denied to these plaintiffs both at the Circuit Court level and at the Claims Commission level. Neither accorded the plaintiffs consideration or the actual loss of their property or gave them due process as to the taking of their property or their *damages* or rights arising therefrom. Yes, they did receive an award for damages to the property they retained, but the system set up by the State refused to act or to give them any other consideration. Thereby, they were denied due process, and the Arkansas Highway Commission was allowed to take their property without due process or compensation. Thus, they have been denied their rights pursuant to Amendment 14 of the U. S. Constitution which precludes any State from depriving a person of life, liberty or property without due process of law. Further, Amendments 5 and 8 to the U. S. Constitution and Article 2, §§21 and 22 of the Arkansas Constitution provide additional support for the proposition of denial of appellants' constitutional rights. The appellants here pursued the options provided by the State, which, if they had worked, might have satisfied the due process requirements and arguments herein. However, they did not, and the facts remain that these plaintiffs have had no opportunity to present their case nor be heard with regard to the taking of their property nor the denial of their due process issues.

The Highway Commissioners knew or should have known that

this was a taking of property without any due process. Such a taking is not one in good faith. The Highway commission did not follow the appropriate action pursuant to their right of eminent domain as set out in the State statutory proviso. (A.C.A. 27-67-301 et. fol.) In ***Harris v. Missouri Conservation Commission,*** 790 F2d 678; and in 472 F. App. 333 (E.D. Ark. 1974), the procedures had not been followed as provided for by the State to rectify wrongs and to provide compensation. Therefore, no lack of due process was found. In the present instance, those procedures have been followed, but the procedures have not proven to provide due process to these appellants. Therefore, this Court is the appropriate forum under 42 U.S.C. §1983 for redress for violation of rights. State officials who violate a party's federal, constitutional, or statutory rights may be made to respond in damages within the Federal Court system. *City of Greenwood, Mississippi v. Peacock,* 384 U. S. 808 (1966).

As has previously been held, where a governmental agency takes the property of a person and then constitutes itself a Judge in the same case to determine the just compensation, this offends the most fundamental principles of natural justice and constitutional law. The determination of what is a proper compensation must be determined through a judicial function. See *Florida Power Corp. v. F.C.C.,* 772 F. 2d 1537, rehearing denied 778 F. 2d 793, probable jurisdiction noted 106 S. Ct. 2273, 476 U. S. 1156, 90 L. Ed. 2d 716, reversed 107 S. Ct. 1107, 480 U.S. 245, 94 L. Ed. 2d 282. In Arkansas, at best, there is a quasi-judicial body called the State Claims Commission. The only potential appeal provided for, would be to the Arkansas Legislature. That is obviously not a judicial body under any sense of the word, and is not appropriate bases nor forum for adjudication of damages. In the present instance, the Arkansas Claims Commission failed to act in the appropriate method and bases for determination of damages. They refused to consider the constitutional violation. Obviously, these are issues which would have to be fleshed out upon trial of the cause on its merits, but could not be done when a motion to dismiss is granted summarily. As here, when reviewing a dismissal on the pleadings, the material facts alleged by the losing party must be taken as true. *Hospital Building Company v. Trustees of Rex Hospital,* 96 S. Ct. 1848, 425 U.S. 738, 48 L. Ed. 2nd 338, appeal after remand 691 F2d 678. The

appellants do not deny the quote recited by the Trial Court from *Bailey v. Anderson,* 326 U.S. 203 at page 205 that:

> It has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning of authority, provided only that the owner have opportunity, in the course of the condemnation procedures, to be heard and to offer evidence as to the value of the land taken.

This is all well and good, however, in this instance, the plaintiffs were not granted such a right. Their claims for loss of their land and lack of due process went without any consideration whatsoever. They were summarily dismissed. Had they been accorded those rights and given a valid consideration, this suit would likely never have been filed. However, that has not been done in this instance. Their rights were denied them.

In the case of *Bailey v. Anderson,* supra, the complaining parties there were given a full opportunity to be heard and to introduce evidence which was then subject to **judicial review.** Neither of those opportunities was provided to the appellants herein. That is a critical difference in this action.

The Arkansas Law is clear that "the right of property is above and higher than any constitutional sanctions; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefore (Article 2 Sec. 22 of Arkansas Constitution.) Failure to provide means of restitution to private property without due process of the law is violative of both U.S. and Arkansas Constitution. *Robinson v. Arkansas State Game and Fish Commission,* 565 SW2d 433 (1978); *State v. McElroy* 595 SW2d 659 (1980).

The Arkansas Supreme Court has recognized the requirements of the State to follow the statutory provisions of the law. As noted in *State v. McElroy:*

> The prohibition of the taking, appropriation or damaging of private property without just compensation is binding on all branches of govern-

> ment. The judicial branch is no more vested with the power to take, appropriate or damage the property rights of individuals without compensation than is the executive branch.

Further, in *Arkansas State Highway Commission v. Alcot* ,__ Ark.__, 539 SW2d 432 (1976) of the Arkansas Supreme Court noted that eminent domain was the basis and method by which the State Highway Commission was to take property, and not by usurpation of individual rights as here. Appellants had rights that were clearly violated by the Arkansas Highway Commission and their property was taken. They have not been compensated or given any methodology or procedure by which they might be compensated.

The 8th Circuit Court of Appeals, following the ruling of the Federal District Judge, has determined that the action brought in this incidence is without proper authority based upon governmental immunity. This fails to note, however, the exceptions thereto adjudicated by the Arkansas Supreme Court which provides that a governmental entity cannot avoid the provisions of Arkansas Constitution Article 2, 22, which provides that:

> The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use without just compensation therefor.

The Supreme Court of Arkansas in *Robinson v. City of Ashdown,* 301 Ark. 226, 783 SW2d 53 (1990) determined that where a governmental entity acts in a manner substantially diminishing the value of land of a private land owner, and the government's actions are shown to be intentional, then it cannot escape liability to compensate for the taking of the property on the basis of its tort immunity. The Court there also noted with approval, 2 ALR 2d 677 (1948) which discussed the various circumstances where negligence based acts constituted governmental inverse condemnation.

In the present instance, Jewell and Gladys Kissinger, individuals residing in the City of Jonesboro, Craighead County, Arkansas, had their property taken from them by the Arkansas Highway Commission which, is an arm of the governmental hiarchy within the State.

The action obviously was intentional by the Commission. As was recited in the complaint originally filed herein, the defendant took the property in "a total invalid, illegal and unlawful taking contrary to the instructions of the plaintiffs and over their objections without any lawful authority whatsoever." (Appendix, Exhibit E) Here, as noted in that case, the Highway Commission knew that an invasion of the appellants' interest in the use and enjoyment of the property was certain to result from the Highway Commission's conduct, since they took the land, and then damaged a portion of appellants' other land. Therefore, in such instances the governmental immunity is not applied, since it was obviously an intentional action. *(Robinson v. City of Ashdown,* pages 231232) Also, see Restatement of Torts 2d, 825(b) comment(d).

Further, in *Robinson v. Beaumont,* 91 Ark. 477, 725 SW2d 839 (1987), the Arkansas Supreme Court noted that the Arkansas Courts would hold as the Federal Courts have done, since our procedural rules were patterned after the federal rules that qualified immunity would not apply, and the entity would not be shielded by governmental immunity where, as in this instance, the action taken was obviously one where an official knew or should have known that the action would violate the constitutional rights of the complaining party or where action was taken with malicious intention of deprivation of constitutional rights or other injury. See *Harlow v. Fitzgerald,* 457 U. S. 800 (1982).

Further, the Arkansas Courts have noted that even where governmental immunity is granted by statute, as in Arkansas Statutes Annotated, 12-12-502 thru 12-12-516, where an *official, person* or *institution* participates in an action which might be asserted as exempt due to qualified immunity, the case can only be one of qualified immunity upon a showing of good faith on the part of the official or entity involved. See *Jaggers v. Zolliecoffer,* 290 Ark. 250, 718 SW2d 441 (1986). In the present instance, the Federal District Court gave no consideration to that issue whatsoever, but summarily dismissed the action upon the motion to dismiss. The action was not pursuant to the motion for summary judgment which would require a meeting of proof with proof, but only based upon the pleadings. The burden of proving a qualified immunity is upon the entity asserting same. See *Jaggers v. Zolliecoffer,* supra. The 8th Circuit Court of Appeals summarily dismissed without any consid-

eration of the required proof by the respondent, Arkansas State Highway Commission. This was improper application of the doctrine of governmental immunity, and this Court should grant certiorari so that these very serious, guaranteed constitutional rights can be preserved. Such cases of inverse condemnation and lack of due process have serious consequential value for the individual citizens of this Nation. The summary taking of one's property by any government without due process should be fully and properly addressed and certiorari granted. Proper stands should be set. Therefore, this case is properly before this Court and should be so addressed and certiorari granted. A very significant federal question is before the Court on the individual rights granted by the U. S. Constitution.

Respectfully submitted,

Blackman Law Firm
P. O. Box 1233, 512 West Jefferson
Jonesboro, AR 72403
(5 01) 932-2101 Bar #74013

/s/ Keith Blackman
Attorney for Kissingers

EXHIBIT "E"

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, WESTERN DISTRICT

JEWELL KISSINGER ET UX.,
PLAINTIFFS

vs. NO. CIV 89-69

ARKANSAS STATE HIGHWAY COMMISSION
DEFENDANT

ORDER

On this 1st day of October, 1990, comes on to be heard the motion of defendant, Arkansas State Highway Commission, to dismiss the complaint filed herein against it and the response thereto of plaintiffs, Jewell Kissinger and Gladys Kissinger; upon consideration whereof, and after hearing argument of counsel, the Court is of the Opinion that this action by plaintiffs constitutes a suit against the State of Arkansas and that the Court lacks jurisdiction to hear same.

IT IS THEREFORE CONSIDERED AND ORDERED that the motion of defendant should be, and is hereby, granted, and that this cause must be, and is hereby dismissed without prejudice.

/s/ Gerald Pearson
Circuit Judge
10/16/90

Precedent Prepared By:
/s/ Philip N. Gowen
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

JEWELL KISSINGER AND GLADYS KISSINGER
PLAINTIFFS

vs. NO. J-C-93-378

ARKANSAS STATE HIGHWAY COMMISSION
DEFENDANT

ORDER

Presently before the Court is Defendant's Motion to Dismiss (Doc. #7). In 1987 and 1988, the Defendant's a portion of Plaintiff's property was damaged due to work performed by the Defendant on its adjacent land. Plaintiffs assert that their property was taken by the Defendant without due process of law in violation of the 14th amendment of the U.S. Constitution and Article II, §22 of the Arkansas Constitution as it was done over Plaintiffs objections.

The initial complaint was filed in the Circuit Court of Craighead County, Western District, Arkansas on February 14, 1988, asserting that the Defendant failed to compensate Plaintiff for its condemnation of their property and subsequently violated their constitutional rights. The Circuit Court of Craighead County held that a suit against the Arkansas State Highway Commission is a suit against the State of Arkansas and thus dismissed the case for lack of jurisdiction.

Pursuant to A.C.A. §19-10-101 et seq., Plaintiffs filed a complaint with the Arkansas State Claims Commission. A.C.A. §19-10-204 (a) provides as follows:

> [e]xcept as otherwise provided by law, the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments, and institutions but shall have no jurisdiction of claims against municipalities, counties, school districts, or any other political subdivisions of the state.

The Arkansas State Claims Commission held that Plaintiffs' "right-of-way" claims were invalid but awarded $13,000.00 for driveway and other damages. Plaintiff contends that the Arkansas State Claims Commission failed to rule on the constitutional issue contained in their Complaint and thus this Court is the appropriate forum for consideration of the issue.

Defendant's Motion to Dismiss is based upon the following arguments: (1) the suit is against the Arkansas Highway Commission which is an agency of the State of Arkansas, thus, the suit is barred by the 11th Amendment to the Constitution of the United States; (2) the Arkansas State Claims Commission and the General Assembly have exclusive jurisdiction over monetary claims against the State of Arkansas pursuant to Article 5, §20 of the Constitution of Arkansas, A.C.A. §19-10-101 et seq.; and Section 6 of Act 462 of the Acts of Arkansas of 1949; (3) there is an adequate state remedy; (4) the Complaint fails to state a claim upon which relief can be granted; (5) the Complaint fails to state grounds upon which jurisdiction is asserted; (6) due to the award by the Arkansas State Claims Commission these procedures are barred by application of the doctrines of Res Judicata, Collateral Estoppel, Waiver, Laches and Statue of Limitations; and (7) the Plaintiff has failed to exhaust all available state remedies.

Although the named Defendant in the suit is the Arkansas State Highway Commission, service was made upon the individual members of the Commission. A suit against the Arkansas State Highway Commission or its individual members in there capacity as commissioners is a suit against the State of Arkansas. *Edelman v. Jordan,* 415 U.S. 651 (1974); *Light v. Blackwell,* 472 F.Supp. 333 (E.D.Ark. 1979). Thus it is barred by the Eleventh Amendment to the United States Constitution. Although this finding is dispositive of the suit, the Court will address the Plaintiff's due process arguments.

This is an inverse condemnation action as it is brought to recover damages resulting from work performed on land owned by the Defendant and adjacent to Plaintiff's land. "[A]n inverse condemnation action . . . is not permitted in Arkansas in view of the remedies available in the chancery courts in way of injunctive relief and in the State Claims Commission for monetary damages." *Id.* at 337. Thus, this action is distinct from one in which an individuals property is taken by eminent domain and the owner is given the opportunity to argue before a jury as to the value of the land. The fact that the state

converted Plaintiffs' property prior to a deprivation hearing does not violate Plaintiffs' due process rights.

> [I]t has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken.

Bailey v. Anderson, 326 U.S. 203, 205 (1945) (citations omitted).

"[P]ost deprivation notice and hearing are sufficient to satisfy the requirements of constitutional due process ...". *Harris v. Missouri Conservation Com'n.,* 790 F.2d 676, 678 (8th Cir. 1986).

The Plaintiffs were not deprived of due process as equitable relief through the chancery court was available to the Plaintiff prior to the property conversion and compensation through the State Claims Commission was available after the conversion. *Light* at 336 The Plaintiffs received a post deprivation hearing before the Arkansas State Claims Commission on April 21, 1992 thus their constitutional due process right was not violated. Defendant's Motion to Dismiss is granted.

It is SO ORDERED this 19th day of August, 1994.

/s/ Stephen M. Reasoner
UNITED STATES DISTRICT JUDGE

This document entered on docket sheet in compliance with Rule 58 and/or 79 (a) FRCP on 8-23-94 by MKF.

1995 Legislature

STATE CLAIMS COMMISSION DOCKET

Amount of Claim $50,00.00 Claim No. 91-399C-CC

Jewell Kissinger & Gladys Kissinger Claimant

vs.

AR State Highway Department Respondent State of Arkansas

Date Filed October 18,1991

Attorneys

Keith Blackman, Attorney Claimant
Mark Whitmore, Claims Attorney Respondent

Type of Claim Unlawful taking of property and Attorney Fees (+)

FINDING OF FACTS

The Claimants, Jewell and Gladys Kissinger, represented by Mr. Keith Blackman, Attorney-at-Law, and the Respondent, Arkansas State Highway Department, represented by Mr. Mark Whitmore, Staff Attorney, were present at a hearing on April 21, 1992.

At the 1992 hearing the Claims Commission directed the parties to discuss the cost of a new driveway onto Claimant's property. The Claimants were directed to obtain at least three estimates on the cost of a driveway and provide the estimates to the Respondent. Also at the 1992 hearing the Claims Commission unanimously held the "right-of-way" issue involved in the claim to be invalid and denied that part of the claim.

After receiving driveway and other damage estimates from the Claimants and comment from the Respondent the Claims Commission does now unanimously find Respondent liable for damage to Claimant's property in the amount of $ 13,000.00. Therefore, the Claims Commission unanimously awards this claim in the amount of $ 13,000.00, and **will present this claim to the 80th General Assembly, 1995 Legislature, for subsequent approval and payment.**

The Claims Commission strongly recommends that in the future

the Arkansas State Highway Department notify all adjacent landowners, by mail, before proposed construction begins of the name and address of any project contractor(s) and how to proceed with claims against said contractor(s) for any alleged damage they cause to the owner's property.

IT IS SO ORDERED.

CONCLUSION

The Claims Commission unanimously approves this claim in the amount of $ 13,000.00, and hereby directs the Claims Commission Clerk **to submit a Special Claims Bills covering payment to the 80th General Assembly, 1993 Legislature, for subsequent approval and payment.**

Date of Hearing April 21, 1992

Date of Disposition August 10, 1993

/s/ Diane Pieroni
Chairman

/s/ Ron Owens
Commissioner

/s/Robert Handley
Commissioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 94-3237

Jewell Kissinger; Gladys Kissinger, Appellants,

v.

Arkansas State Highway Commission, Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[UNPUBLISHED]

Submitted: February 21, 1995
Filed: February 28, 1995

Before FAGG, MAGILL, and BEAM, Circuit Judges.

PER CURIAM.

Jewell and Gladys Kissinger appeal the district court's[1] dismissal of their 42 U.S.C. 5 1983 damages action against the Arkansas State Highway Commission (the Highway Commission). We affirm.

The Kissingers alleged that part of their land was wrongfully taken by the Highway Commission when it exercised a right-of-way it held. The Kissingers alleged this act violated their rights under the Fourteenth Amendment and the Arkansas Constitution because the Highway Commission failed to provide them sufficient compensation or due process. The district court dismissed the action, concluding it

[1]The Honorable Stephen M. Reasoner, Chief Judge, United States District Court for the Eastern District of Arkansas.

was a suit against the State of Arkansas, and as such, was barred by the Eleventh Amendment.

Absent consent or Congressional abrogation, "a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Williams v. Missouri*, 973 F.2d 599, 599-600 (8th Cir. 1992) (per curiam) (Eleventh Amendment immunity bars suit absent two exceptions, Congressional abrogation or state waiver). "[A] state agency which is the sole creation of the state has no separate identity, and thus cannot be stripped of it's [sic] official character." *Glick v. Henderson*, 855 F.2d 536, 540 (8th Cir. 1988) (Eleventh Amendment barred injunction against Arkansas Board of Corrections). The Highway Commission is a state agency created by the Arkansas Constitution and charged solely with the administrative control of the Arkansas Highway and Transportation Department. *See* Ark. Const. Amend. 42 § 1 (Michie 1987) (creation and powers); Ark. Code Ann. § 27-65-102 (Michie 1994) (control of highway department); Ark. Code Ann. § 27-65-107 (Michie 1994) (powers and duties). Thus, the district court correctly concluded the Kissingers' action is a suit against the State of Arkansas.

Because the Kissingers have not shown that either of the exceptions to the Eleventh Amendment are applicable, their suit is barred. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (state's waiver of immunity must be "express" waiver); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 66 (1989) (state is not a "person" within meaning of section 1983; section 1983 did not abrogate states' Eleventh Amendment immunity).

The dismissal is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

(2)

Supreme Court, U.S.
FILED
JUN 26 1995
OFFICE OF THE CLERK

No. 94-1954

In The

Supreme Court of the United States

October Term, 1994

JEWELL KISSINGER and GLADYS KISSINGER

Petitioners,

v.

ARKANSAS STATE HIGHWAY COMMISSION

Respondent.

Petition For Writ Of Certiorari To Review Decision Of Eighth Circuit Court Of Appeals

BRIEF IN OPPOSITION

ROBERT L. WILSON, Chief Counsel
Counsel of Record
MARK J. WHITMORE
CALVIN R. GIBSON
Arkansas State Highway and Transportation Department
Post Office Box 2261
Little Rock, AR 72203
(501) 569-2271

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

40 pp

QUESTION PRESENTED

Whether a suit commenced under 42 U.S.C § 1983 seeking damages against the sovereign State of Arkansas is barred by the Eleventh Amendment.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Statement of the Case 1

Brief and Argument 2

Appendix

Order of Craighead County Circuit Court A-1

Opinion of Arkansas State Claims Commission ... B-1

Order of Dismissal 8-23-94 (U.S. District Court) ... C-1

Order of 8th Circuit U.S. Court of Appeals D-1

TABLE OF AUTHORITIES

Page

CASES:

Alabama v. Pugh, 438 U.S. 781 (1978) 3

Arkansas State Highway Comm'n v. Lasley, 239 Ark. 538, 397 S.W.2d 443 (1969) 9

Arkansas State Highway Comm'n v. Partain, 192 Ark. 127, 90 S.W.2d 108 (1936) 10

Austin v. Arkansas State Highway Comm'n, 320 Ark. 282, ___ S.W.2d ___ (1995) 3, 10

Bailey v. Anderson, 326 U.S. 203 (1945) 9

Bryant v. Arkansas State Highway Comm'n, 233 Ark. 41, 342 S.W.2d 415 (1961) 3

Butler v. City of North Little Rock, 980 F.2d 501 (8th Cir. 1992) 13

Collier v. City of Springdale, 733 F.2d 1311 (8th Cir. 1984) 9, 10, 13

Duhne v. New Jersey, 251 U.S. 311 (1920) 4

Edleman v. Jordan, 415 U.S. 651 (1974) 3, 4, 5, 7

Ex parte State of New York, 256 U.S. 490 (1921) 5

Employees v. Dept. Of Public Health and Welfare, 411 U.S. 279 (1973) 4

Fireman's Insurance Company v. Arkansas State Claims Commission, 301 Ark. 415, 784 S.W.2d 771 (1990), cert. denied, ___ U.S. ___, 111 S.Ct. 76, 112 L.Ed.2d 50 .....10, 11

Flake v. Arkansas State Highway Commission, 251 Ark. 1084, 476 S.W.2d 801 (1972) 10

TABLE OF AUTHORITIES – Continued

Page

Florida Dept. Of Health and Rehabilitated Serv. v. Florida Nursing Home Assn., 450 U.S. 147 (1981) (per curiam) 3

Glick v. Henderson, 855 F.2d 536 (8th Cir. 1988) 3

Great Northern Life Insurance Company v. Read, 322 U.S. 47 (1944) 4

Hans v. Louisiana, 134 U.S. 1 (1890) 4

Harris v. Missouri Conservation Comm'n, 790 F.2d 678 (8th Cir. 1986) 9, 13

Light v. Blackwell, 474 F.Supp.333 (E.D. Ark. 1979), aff'd mem., 620 F.2d 307, (8th Cir. 1980) 3, 11

Missouri v. Fiske, 290 U.S. 18, (1933) 4

Parden v. Terminal Ry. Co., 377 U.S. 184, (1964) 4

Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, (1984) 3, 5, 8

Pitcock v. State, 91 Ark. 527, 121 S.W.2d 742 (1902) 8

Quern v. Jordan, 440 U.S. 332, (1979) 7

Roesler v. Denton, 239 Ark. 462, 390 S.W.2d 98, (1965) 11

Tri-B Advertising, Inc. v. Arkansas State Highway Comm'n, 260 Ark. 227, 539 S.W.2d 430, (1976) 3

Will v. Michigan Dept. of State Police, 491 U.S. 59 (1989) 7

Williams v. Missouri, 973 F.2d 599 (8th Cir. 1992) ... 3, 4, 7

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Amend. XI ... *passim*

Constitution of United States, Article III 4, 6, 14

Constitution of Arkansas, Amend. 42 § 1 3

Constitution of Arkansas, Article 5 § 20.....8, 13

LEGISLATIVE PROVISIONS:

Ark. Code Ann. § 27-65-102 3

Ark. Code Ann. § 27-65-107 3

Ark. Code Ann. § 19-10-204(a) 8

Ark. Code Ann. § 19-10-205-210..... 11

STATEMENT OF THE CASE

The Complaint filed below was an action under 42 U.S.C § 1983 for inverse condemnation seeking damages from the Respondent, the Arkansas State Highway Commission ("Highway Commission"). The United States District Court for the Eastern District of Arkansas granted the Motion To Dismiss filed by the Highway Commission and the Petitioners, Jewell and Gladys Kissinger ("Kissingers"), appealed. The United States Court of Appeals for the Eighth Circuit affirmed the District Court's dismissal of the Kissingers' Complaint, holding that such an action was a suit against the State of Arkansas and, as such, was barred by the Eleventh Amendment.

In their Complaint, the Kissingers alleged that in the late 1987 and early 1988 the Highway Commission damaged, trespassed upon, and took their property while widening the existing State highway adjacent to their property. It was alleged that such action was done without prior notice or the initiation of condemnation proceedings in State Court and that such action violated their Constitutional rights. The Kissingers originally lodged their action before the Circuit Court of Craighead County, Arkansas. The Circuit Court held that such an action against the Highway Commission was suit against the State of Arkansas and dismissed for lack of jurisdiction. After the dismissal of the action in Circuit Court, the Kissingers filed their action before the Arkansas State Claims Commission. The Arkansas State Claims Commission conducted an evidentiary hearing in which the Kissingers appeared and were represented by counsel. The Claims made specific findings of fact and ruled the

Kissingers' claim that the Highway Commission unlawfully took their land was invalid and therefore denied. The Claims Commission found that the Kissingers should be compensated for damages to their property in the amount of $13,000.00 and presented the award to the Arkansas General Assembly for subsequent approval and payment.

On November 13, 1993, the Kissingers filed a Complaint against the Highway Commission in the United States District Court for the Eastern District of Arkansas, alleging their inverse condemnation action under 42 U.S.C. § 1983 seeking monetary award. The District Court dismissed their Complaint and the Eighth Circuit affirmed the District Court's dismissal of the Kissingers' 42 U.S.C. § 1983 action, ruling that such an action was a suit against the State of Arkansas, and as such, was barred by the Eleventh Amendment of the Constitution of the United States.

BRIEF AND ARGUMENT

The Petitioners herein, Jewell and Gladys Kissinger ("Kissingers"), filed a Complaint in the United States District Court for Eastern District of Arkansas, asserting jurisdiction under 42 U.S.C. § 1983 seeking damages against the Arkansas State Highway Commission ("Highway Commission") The Eighth Circuit Court of Appeals affirmed the District Court's dismissal of the Kissingers' Complaint filed under 42 U.S.C. § 1983 because the Kissingers were seeking monetary damages from the Highway Commission and such an action was a suit

against the State of Arkansas; therefore the action was barred by the Eleventh Amendment of the United States Constitution.

The Highway Commission is an agency of the State of Arkansas created by the Arkansas Constitution and charged solely with the administrative control of the Arkansas Highway and Transportation Department. See Ark. Const. Amend. 42 § 1, (Michie 1987) (creation and powers); Ark. Code Ann. § 27-65-102 (Michie 1994) (control of Highway Department); Ark. Code Ann. § 27-65-107 (Michie 1994) (powers and duties). Thus, a suit against the Highway Commission is a suit against the State of Arkansas. *Austin v. Arkansas State Highway Comm'n*, 320 Ark. 292, ___ S.W.2d ___ (1995); *Tri-B Advertising, Inc. v. Arkansas State Highway Comm'n*, 260 Ark. 227, 539 S.W.2d 430 (1976); *Bryant v. Arkansas State Highway Commission*, 233 Ark. 41, 342 S.W.2d 415 (1961). A suit against the Highway Commission is a suit against the State of Arkansas and as such the suit is barred by the Eleventh Amendment of the Constitution of the United States. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 663 (1974); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89 (1984); *Glick v. Henderson*, 855 F.2d 536 (8th Cir. 1988); *Williams v. Missouri*, 973 F.2d 599 (8th Cir. 1992) (per curiam); and *Light v. Blackwell*, 474 F.Supp. 333 (E.D. Ark. 1979), aff'd mem. 620 F.2d 307 (8th Cir. 1990).

Absent consent or Congressional abrogation, a suit in which the State or one of its agencies or departments is named as a defendant is proscribed by the Eleventh Amendment. *Pennhurst*, (465 u.s. 89); see, e.g., *Florida Dept. of Health and Rehabilitated Serv. v. Florida Nursing Home Assn.*, 450 U.S. 147 (1981) (per curiam); *Alabama v.*

Pugh, 438 U.S. 781 (1978) (per curiam); *Missouri v. Fiske*, 290 U.S. 18 (1933); *Williams*, 973 F.2d 599.

Also it should be noted that the scope of Article III of the United States Constitution did not extend federal jurisdiction to suits against a sovereign State by a citizen of that State. In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court held a Federal Court could not entertain a suit brought by a citizen against its own State. After reviewing the Constitutional debates concerning the scope of Article III, the Court determined that the federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution nor in establishing the judicial power of the United States." *Id.* at 15. See also, *Duhne v. New Jersey*, 251 U.S. 311 (1920); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47 (1944); *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964); *Employees v. Dept. of Public Health & Welfare*, 411 U.S. 279 (1973); and *Edelman*, 415 U.S. 651.

The principle of sovereign immunity has been held to be a Constitutional limitation on the federal judicial power established in Article III:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this Court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given; not one brought by citizens of another State or by citizens or subjects of a foreign State because of the Eleventh Amendment; and not even one

> brought by its own citizens, because of the fundamental rule of which the amendment is but an exemplification.

Ex parte State of New York, 256 U.S. 490, 497 (1921). See also, *Pennhurst*, 465 U.S. at 98.

The Court explained in *Edelman v. Jordan* that:

> The historical basis of the Eleventh Amendment has been oft stated, and represents one of the more dramatic examples of the Supreme Court's effort to derive meaning from the document given to the Nation by the Framers of the Constitution. Nearly 200 years ago, a leading historian of the Court tells us:
>
> "The right of the federal judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject the deep apprehension and an act of debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new federal government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted."

1C Warren, The Supreme Court in United States history 91 (Rev. Ed. 1937). *Id.* at 660.

Petitioners offer nothing by way of legal argument or legal precedents of any Court that suggests that the jurisdiction of federal courts extend to suits commenced under 42 U.S.C. § 1983 seeking damages against an agency of a sovereign State. In light of Rule 10 of the Rules of the Supreme Court of the United States, the Court could expect the Petitioners to direct attention to

conflict between the ruling of the United States Court of Appeals for the Eighth Circuit rendered herein and decisions, if any, rendered to the contrary by the United States Supreme Court, by any United States Court of Appeals, or by any State Courts of last resort. Nowhere within their Brief and Argument do the Petitioners reference any precedents or legal authority which suggests that either Congress has abrogated the Eleventh Amendment proscription of suits against a sovereign State, or that the State of Arkansas has consented to suits in the federal courts. This omission is glaring in light of Rule 10, and the holding from which they seek review, wherein the United States Court of Appeals for the Eighth Circuit held, to-wit:

> Because the Kissingers have not shown that either of the exceptions to the Eleventh Amendment are applicable, their suit is barred.

To date, Petitioners neither assert that Congress has abrogated the Eleventh Amendment nor that the State of Arkansas has consented to be sued in federal courts.

Although the Petitioners' basis for federal jurisdiction of a suit against the State of Arkansas remains unstated and unclear, the assertions of Respondent and the law are clear that the Highway Commission is an agency of the sovereign State of Arkansas, and as such, the suit commenced in the District Court pursuant to 42 U.S.C. § 1983 is a suit against the State of Arkansas, barred by the Eleventh Amendment of the Constitution, and not contemplated by the framers of the Constitution within the scope of the federal jurisdiction under Article III of the Constitution of the United States. Congress has not

abrogated the Eleventh Amendment nor has the State of Arkansas consented to suit in federal court.

In *Edelman v. Jordan*, the Court specifically held that 42 U.S.C. § 1983 did not abrogate the Eleventh Amendment immunity of the States. In a sequel to *Edelman v. Jordan*, *Quern v. Jordan*, 440 U.S. 332, 345 (1979), the Court held:

> By contrast, § 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of State liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States. Nor does our reaffirmance of Edelman render § 1983 meaningless in so far as States are concerned.

Further, in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), the Court held that neither States nor State officials acting in their official capacities are "persons" within the meaning of § 1983. See also, *Williams v. Missouri*, 973 F.2d 599 (8th Cir. 1992).

In determining whether a State has waived from suit its immunity from suit in the federal courts, the Court in *Edelman v. Jordan*, pronounced the following test, to-wit:

> In deciding whether a State has waived its Constitutional protection under Eleventh Amendment, we will find waiver only where stated "by the most expressed language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction."

Murry v. Wilson Distilling Co., 213 U.S. 151, 171 (1909) *Id.* at 673.

Moreover, in *Pennhurst*, the Court held: "A State's Constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." 465 U.S. at 99 (emphasis in original).

Thus, a State does not waive Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own Courts. *Id.* at 99 n.9.

Clearly, the State of Arkansas has not waived its sovereign immunity or consented to be sued in the federal courts. In fact, the State has not waived its immunity in its own Courts. Article 5, Section 20, of the Arkansas Constitution provides that "the State of Arkansas is never to be made defendant in any of her Courts." Further, Ark. Code Ann. § 19-10-204(a) (Michie 1994) provides:

> Except as otherwise provided by law, the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments, and institutions, but shall have no jurisdiction of claims against municipalities, counties, school districts, or any other political subdivisions of the State.

Thus, the sovereign State of Arkansas maintains its sovereignty as a matter of its own Constitutional mandate. There is no authority in the law to waive the State's immunity to suit, and the State of Arkansas is not bound in by the unauthorized acts of its agents or erroneous construction of law by its representatives. *Pitcock v. State*,

91 Ark. 527, 121 S.W.2d 742 (1909); *Arkansas State Highway Comm'n v. Lasley*, 239 Ark. 538, 390 S.W.2d 443 (1965).

In this action, the Kissingers allege that a portion of their property was damaged due to work performed by the Arkansas State Highway Commission when it widened the existing State highway, that the property was taken by the Highway Commission, and that such an act violated their rights under the Fourteenth Amendment of the United States Constitution and Article 2, Section 22, of the Arkansas Constitution.

As noted by the District Court for the Eastern District of Arkansas, the fact that the State is alleged to have converted the Kissingers' property prior to a deprivation hearing does not violate Kissingers' due process rights. In *Bailey v. Anderson*, 326 U.S. 203, 205 (1945),

> It has long been settled that due process does not require a condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity in the Courts of condemnation proceedings, to be heard and to offer evidence as to the value of the land taken.

Even if as alleged, the Highway Commission had taken their property without prior notice or prior hearing, post-deprivation notice and hearing are sufficient to protect landowners' due process rights. In *Harris v. Missouri Conservation Comm'n*, 790 F.2d 678 (8th Cir. 1986), the court held that post-deprivation notice and hearing were sufficient to protect the landowners' due process rights. Further, in *Collier v. City of Springdale*, 733 F.2d 1311 (8th Cir. 1984), the court held that the landowner could maintain a § 1983 action premised on the unlawful

taking of property in light of remedies available under the laws of Arkansas for compensating property owners whose property is alleged to have been taken for public use. The Court therein stated:

> Thus, it is well settled that a sovereign vested with the power of eminent domain may exercise that power consistent with the Constitution without providing prior notice, hearing or compensation so long as there exist an adequate mechanism for obtaining compensation.

Id. at 1314.

The State of Arkansas provides adequate State remedies to aggrieved landowners. A landowner has available remedies through the Chancery Courts of Arkansas where the State may be enjoined from taking property until just compensation is provided therefor. *Austin v. Arkansas State Highway Comm'n*, 320 Ark. 292, ___ S.W.2d ___; *Flake v. Arkansas State Highway Comm'n*, 251 Ark. 1084, 476 S.W.2d 801 (1972); *Arkansas State Highway Commission v. Partain*, 192 Ark. 127, 90 S.W.2d 108 (1936).

Further, an aggrieved landowner may seek a retroactive monetary award through the State Claims Commission. It has been consistently held that the remedies available by way of prospective injunctive relief through the Chancery Courts and for a retroactive monetary award through the Arkansas State Claims Commission afford aggrieved parties an adequate State remedy and satisfy the due process requirements of the Constitution of the United States and the Constitution of the State of Arkansas. *Austin v. Arkansas State Highway Comm'n*, 320 Ark. 292 ___ S.W.2d ___; *Fireman's Ins. Co. v. Arkansas State*

Claims Comm'n, 301 Ark. 415, 784 S.W.2d 771 (1990), cert. denied, ___ U.S. ___, 111 S.Ct. 76, 112 L.Ed.2d 50; *Roesler v. Denton*, 239 Ark. 462, 390 S.W.2d 98 (1965), and *Light v. Blackwell*, 474 F.Supp. 333 (E.D.Ark. 1979).

If, as alleged by the Kissingers, in the latter part of 1987 and the early part of 1988, the Highway Commission in widening the existing highway adjacent to their property acted in such a manner so as to constitute a taking of their property in violation of their Constitutional rights, then the laws of the State of Arkansas provide an adequate State remedy by virtue of prospective injunctive relief available through the Chancery Courts of Arkansas as a means to prohibit the State agency from taking property without the initiation of statutory condemnation procedures. The laws of Arkansas further provide a means for obtaining a retroactive monetary award for property taken or damaged by the State, and provide a claim procedure and evidentiary hearing before the Arkansas State Claims Commission. Ark. Code Ann. § 19-10-205-210 (Michie 1994). Further, the laws of Arkansas afford parties dissatisfied with the sum of an award of the Claims Commission the right to appeal to the General Assembly of the Legislature of the State of Arkansas.

The Supreme Court of Arkansas stated in *Fireman's Ins. Co. v. Arkansas State Claims Comm'n*:

> Since the act creating the Claims Commission grants the power of review only to the legislature and without question delegated the Commission duties which are, under the Constitution, solely the duties of the General Assembly, the Claims Commission proceedings

> are vast proceedings of the General Assembly and not subject to the provisions of the Administrative Procedures Act.
>
> Appellants are obligated to seek review by the General Assembly under the Claims Commission rule promulgated by the Commission under the authority of the General Assembly. Appellants have elected to bypass those rules and proceedings and seek direct review by the judicial system without exhausting remedies provided by the Claims Commission.
>
> Appellants have no standing to argue a denial of due process unless and until they have exhausted their procedural remedies. See *Bar v. Arkansas Blue Cross and Blue Shield, Inc.*, 297 Ark. 262, 761 S.W.2d 174 (1988). In this instance, the remaining remedy is a review by the General Assembly.
>
> Since we hold that the Claims Commission is an arm of the General Assembly and the General Assembly has total control over the determination of, and subsequent funding for, payments of the 'just debts and obligations of the State' – all other avenues for redress through legal proceedings being barred by the sovereign immunity provision of the Constitution – appellants' argument that the State Claims Commission system, without provision for judicial review, violates separation of powers is without merit.

Id. at 458.

In the instant case, the Kissingers did not avail themselves of the remedy available through the Chancery Courts for prospective and injunctive relief. Rather, they filed an action for monetary damages in the Circuit Court

of Arkansas in contravention of Article 5, Section 20 of the Arkansas Constitution, and the suit was dismissed on October 1, 1990, by the Circuit Court of Craighead County, Arkansas. Further, the Kissingers appeared and were represented by counsel at an evidentiary hearing wherein their claims were presented before the Arkansas State Claims Commission. The Arkansas State Claims Commission found that the "right of way" issue to be invalid and denied that part of the claim, but awarded the sum of $13,000.00 as compensation for damages to the Kissingers' property. The award of $13,000.00 was presented to the 80th General Assembly, 1995 Legislature, for subsequent approval and payment. The Kissingers were afforded due process of law by virtue of the State mechanisms afforded under Arkansas law.

Finally, the Kissingers failed to pursue and avail themselves of their right to appeal of decisions of the Arkansas State Claims Commission to the General Assembly of the State of Arkansas and have attempted to bypass such an appeal and seek redress in the federal courts. Failure of a party to avail themselves of the right of appeal afforded by the State constitutes a bar to redress for alleged deprivation of property without due process in the federal courts of the United States. See *Harris v. Missouri Conservation Comm'n*, 790 F.2d at 681; *Collier v. City of Springdale*, 733 F.2d at 1316; *Butler v. City of North Little Rock*, 980 F.2d 501, 505 (8th Cir. 1992).

In conclusion, Petitioners make no assertion consistent with Rule 10 of the Rules of the Supreme Court of the United States that decisions exist which are contrary to the decision rendered of the United States Court of

Appeals for the Eighth Circuit herein. It is well established in the law that the Highway Commission is an agency of the sovereign State of Arkansas, and as such, the damages action of the Petitioners under 42 U.S.C. § 1983 is barred by the Eleventh Amendment and outside the scope of federal jurisdiction under Article III. It is well established in the law that in enacting § 1983 Congress did not abrogate the Eleventh Amendment; and that the sovereign State of Arkansas has not waived its immunity from suit in federal courts. Further, it is well established that the laws of Arkansas provide adequate State remedies for the Kissingers' through prospective injunctive relief in the Chancery Courts of Arkansas, a retroactive monetary award before the State Claims Commission, and review by the General Assembly of the State of Arkansas.

ROBERT L. WILSON, Chief Counsel
Counsel of Record
MARK J. WHITMORE
CALVIN R. GIBSON
Arkansas State Highway and
Transportation Department
Post Office Box 2261
Little Rock, AR 72203
(501) 569-2271

APPENDICES

IN THE CIRCUIT COURT OF
CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

JEWELL KISSINGER ET UX.,
PLAINTIFFS

vs. NO. CIV 89-69

ARKANSAS STATE HIGHWAY COMMISSION
DEFENDANT

ORDER

On this 1st day of October, 1990, comes on to be heard the motion of defendant, Arkansas State Highway Commission, to dismiss the complaint filed herein against it and the response thereto of plaintiffs, Jewell Kissinger and Gladys Kissinger; upon consideration whereof, and after hearing argument of counsel, the Court is of the Opinion that this action by plaintiffs constitutes a suit against the State of Arkansas and that the Court lacks jurisdiction to hear same.

IT IS THEREFORE CONSIDERED AND ORDERED that the motion of defendant should be, and is hereby, granted, and that this cause must be, and is hereby dismissed without prejudice.

/s/ Gerald Pearson
Circuit Judge
10/16/90

Precedent Prepared By:
/s/ Philip N. Gowen
Attorney for Defendant

1995 Legislature

STATE CLAIMS COMMISSION DOCKET

Amount of Claim $50,000.00 Claim No. 91-399C-CC

Jewell Kissinger & Gladys Kissinger Claimant

vs.

AR State Highway Department Respondent State of Arkansas

Date Filed October 18, 1991

Attorneys

Keith Blackman, Attorney Claimant
Mark Whitmore, Claims Attorney Respondent

Type of Claim Unlawful taking of property and Attorney Fees (+)

FINDING OF FACTS

The Claimants, Jewell and Gladys Kissinger, represented by Mr. Keith Blackman, Attorney-at-Law, and the Respondent, Arkansas State Highway Department, represented by Mr. Mark Whitmore, Staff Attorney, were present at a hearing on April 21, 1992.

At the 1992 hearing the Claims Commission directed the parties to discuss the cost of a new driveway onto Claimant's property. The Claimants were directed to obtain at least three estimates on the cost of a driveway and provide the estimates to the Respondent. Also at the 1992 hearing the Claims Commission unanimously held the "right-of-way" issue involved in the claim to be invalid and denied that part of the claim.

After receiving driveway and other damage estimates from the Claimants and comment from the Respondent the Claims Commission does now unanimously find Respondent liable for damage to Claimant's property in the amount of $13,000.00. Therefore, the Claims Commission unanimously awards this claim in the amount of $13,000.00, and **will present this claim to the 80th General Assembly, 1995 Legislature, for subsequent approval and payment.**

The Claims Commission strongly recommends that in the future the Arkansas State Highway Department notify all adjacent landowners, by mail, before proposed construction begins of the name and address of any project contractor(s) and how to proceed with claims against said contractor(s) for any alleged damage they cause to the owner's property.

IT IS SO ORDERED.

CONCLUSION

The Claims Commission unanimously approves this claim in the amount of $13,000.00, and hereby directs the Claims Commission Clerk **to submit a Special Claims Bills covering payment to the 80th General Assembly, 1993 Legislature, for subsequent approval and payment.**

Date of Hearing April 21, 1992.

Date of Disposition August 10, 1993.

/s/ Diane Pieroni
Chairman

/s/ Ron Owens
Commissioner

/s/ Robert Handley
Commissioner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

JEWELL KISSINGER AND GLADYS KISSINGER
PLAINTIFFS

vs. NO. J-C-93-378

ARKANSAS STATE HIGHWAY COMMISSION
DEFENDANT

ORDER

Presently before the Court is Defendant's Motion to Dismiss (Doc. #7). In 1987 and 1988, the Defendant's portion of Plaintiff's property was damaged due to work performed by the Defendant on its adjacent land. Plaintiffs assert that their property was taken by the Defendant without due process of law in violation of the 14th amendment of the U.S. Constitution and Article II, § 22 of the Arkansas Constitution as it was done over Plaintiff's objections.

The initial complaint was filed in the Circuit Court of Craighead County, Western District, Arkansas on February 14, 1988, asserting that the Defendant failed to compensate Plaintiff for its condemnation of their property and subsequently violated their constitutional rights. The Circuit Court of Craighead County held that a suit against the Arkansas State Highway Commission is a suit against the State of Arkansas and thus dismissed the case for lack of jurisdiction.

Pursuant to A.C.A. § 19-10-101 et seq., Plaintiffs filed a complaint with the Arkansas State Claims Commission. A.C.A. § 19-10-204(a) provides as follows:

> [e]except as otherwise provided by law, the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments, and institutions but shall have no jurisdiction of claims against municipalities, counties, school districts, or any other political subdivisions of the State.

The Arkansas State Claims Commission held that Plaintiffs' "right-of-way" claims were invalid but awarded $13,000.00 for driveway and other damages. Plaintiff contends that the Arkansas State Claims Commission failed to rule on the constitutional issue contained in their Complaint and thus this Court is the appropriate forum for consideration of the issue.

Defendant's Motion to Dismiss is based upon the following arguments: (1) the suit is against the Arkansas Highway Commission which is an agency of the State of Arkansas, thus, the suit is barred by the 11th Amendment to the Constitution of the United States; (2) the Arkansas State Claims Commission and the General Assembly have exclusive jurisdiction over monetary claims against the State of Arkansas pursuant to Article 5, § 20 of the Constitution of Arkansas. A.C.A. § 19-10-101 et seq.; and Section 6 of Act 462 of the Acts of Arkansas of 1949; (3) there is an adequate state remedy; (4) the Complaint fails to state a claim upon which relief can be granted; (5) the Complaint fails to state grounds upon which jurisdiction is asserted; (6) due to the award by the Arkansas State Claims Commission these procedures are barred by application of the doctrines of Res Judicata, Collateral Estoppel, Waiver, Laches and Statute of Limitations; and (7) the Plaintiff has failed to exhaust all available state remedies.

Although the named Defendant in the suit is the Arkansas State Highway Commission, service was made upon the individual members of the Commission. A suit against the Arkansas State Highway Commission or its individual members in their capacity as Commissioners is a suit against the State of Arkansas. *Edelman v. Jordan,* 415 US 651 (1974); *Light v. Blackwell,* 472 F.Supp. 333 (E.D.Ark. 1979). Thus it is barred by the Eleventh Amendment to the United States Constitution. Although this finding is dispositive of the suit, the Court will address the Plaintiff's due process arguments.

This is an inverse condemnation action as it is brought to recover damages resulting from work performed on land owned by the Defendant and adjacent to Plaintiff's land. "[A]n inverse condemnation action . . . is not permitted in Arkansas in view of the remedies available in the chancery courts in way of injunctive relief and in the State Claims Commission for monetary damages." *Id.* at 337. Thus, this action is distinct from one in which an individuals property is taken by eminent domain and the owner is given the opportunity to argue before a jury as to the value of the land. The fact that the state converted Plaintiff's property prior to a deprivation hearing does not violate Plaintiffs' due process rights.

> [I]t has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken.

Bailey v. Anderson, 326 U.S. 203, 205 (1945) (citations omitted).

"[P]ost deprivation notice and hearing are sufficient to satisfy the requirements of constitutional due process . . . ". *Harris v. Missouri Conservation Com'n.* 790 F.2d 676, 678 (8th Cir. 1986).

The Plaintiffs were not deprived of due process as equitable relief through the chancery court was available to the Plaintiff prior to the property conversion and compensation through the State Claims Commission was available after the conversion, *Light* at 336. The Plaintiffs received a post deprivation hearing before the Arkansas State Claims Commission on April 21, 1992 thus their constitutional due process right was not violated. Defendant's Motion to Dismiss is granted.

It is SO ORDERED this 19th day of August, 1994.

/s/ Stephen M. Reasoner
UNITED STATES DISTRICT JUDGE

This document entered on docket sheet in compliance with Rule 58 and/or (a) FRCP on 8-23-94 by MFK.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3237

Jewell Kissinger; Gladys Kissinger, Appellants,

v.

Arkansas State Highway Commission, Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

[UNPUBLISHED]

Submitted: February 21, 1995
Filed: February 28, 1995

Before FAGG, MAGILL, and BEAM, Circuit Judges.

PER CURIAM.

Jewell and Gladys Kissinger appeal the district court's[1] dismissal of their 42 USC § 1983 damages action against the Arkansas State Highway Commission (the Highway Commission). We affirm.

The Kissingers alleged that part of their land was wrongfully taken by the Highway Commission when it exercised a right-of-way it held. The Kissingers alleged this act violated their rights under the Fourteenth

---

[1] The Honorable Stephen M. Reasoner, Chief Judge, United States District Court for the Eastern District of Arkansas.

Amendment and the Arkansas Constitution because the Highway Commission failed to provide them sufficient compensation or due process. The district court dismissed the action, concluding it was a suit against the State of Arkansas, and as such, was barred by the Eleventh Amendment.

Absent consent or Congressional abrogation, "a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Williams v. Missouri*, 973 F.2d 599, 599-600 (8th Cir. 1992) (per curiam) (Eleventh Amendment immunity bars suit absent two exceptions, Congressional abrogation or state waiver.) "[A] state agency which is the sole creation of the state has no separate identity, and thus cannot be stripped of it's [sic] official character."

Glick v. Henderson, 855 F.2d 536, 540 (8th Cir. 1988) (Eleventh Amendment barred injunction against Arkansas Board of Corrections). The Highway Commission is a state agency created by the Arkansas Constitution and charged solely with the administrative control of the Arkansas Highway and Transportation Department. *See* Ark. Const. Amend. 42 § 1 (Michie 1987) (creation and powers); Ark. Code Ann. § 27-65-102 (Michie 1994) (control of highway department); Ark. Code Ann. § 27-65-107 (Michie 1994) (powers and duties). Thus, the district court correctly concluded the Kissingers' action is a suit against the State of Arkansas.

Because the Kissingers have not shown that either of the exceptions to the Eleventh Amendment are applicable, their suit is barred. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (state's waiver of immunity must be "express" waiver); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 66 (1989) (state is not a "person" within meaning of section 1983; section 1983 did not abrogate states' Eleventh Amendment immunity).

The dismissal is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.